Supreme Court of the United States

October Term, 1978

No. 78-276

In the Matter of the Application of

FAR ROCKAWAY NURSING HOME
and LASZLO SZANTO, Partner,

Appellant,

For an Order Quashing Subpoenas Issued by

CHARLES J. HYNES, Deputy Attorney General
of the State of New York,

Respondent.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE COURT OF APPEALS

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Statement

Laszlo Szanto has filed a notice of appeal from an order of the New York State Court of Appeals, dated May 4, 1978, which unanimously affirmed an order of the Supreme Court, Queens County, entered December 16, 1977. *Matter of Far Rockaway Nursing Home et al.* v. *Hynes,* 44 N.Y.2d 383 (1978). This order had denied Szanto's motion to

quash a grand jury subpoena issued by the Deputy Attorney General on behalf of a Queens County Grand Jury. This brief is submitted in support of a motion to dismiss this appeal or, in the alternative, to affirm the decision of the Court of Appeals.

Introduction

The Original Subpoena

In October of 1976, a grand jury subpoena duces tecum was issued to Laszlo Szanto, a partner of the Far Rockaway Nursing Home, commanding him to produce the books and records of that home before a Queens County Grand Jury investigating nursing homes.

Mr. Szanto moved to quash this subpoena asserting that production of the home's books and records would violate his Fifth Amendment privilege against self-incrimination, that the subpoena was overbroad and that it had been improperly served. Justice BRENNAN of the Supreme Court of Queens County denied this motion in an order dated November 5, 1976. *Matter of Far Rockaway Nursing Home* v. *Hynes*.

On December 2, 1976, Mr. Szanto appeared outside the grand jury room in response to the subpoena with his attorney. However, he did not bring with him any of the subpoenaed books and records. Assistant Attorney General Frank Marine, after a discussion with Mr. Szanto's attorney, agreed to adjourn the subpoena duces tecum.

On March 18, 1977, Mr. Szanto was informed, through his attorney, to appear before the grand jury on March 31,

1977. A letter confirming this request was sent to both Mr. Szanto and his attorney. His attorney replied to this letter by writing to Assistant Attorney General Marine that Mr. Szanto was under no obligation to appear before the grand jury unless another subpoena were issued, because Mr. Szanto had satisfied his obligation to comply with the subpoena by appearing outside of the grand jury room on December 2, 1976.

Mr. Szanto did not appear before the grand jury as requested on March 31, 1977 and did not produce the subpoenaed materials.

A motion is made to have Szanto held in contempt.

Following Szanto's failure to appear before the grand jury, the Deputy Attorney General moved, by order to show cause, to have Mr. Szanto held in contempt of court. *Matter of Hynes* v. *Szanto*. In response to this motion, Justice AGRESTA of the Supreme Court of Queens County ordered Szanto to appear before the grand jury with the subpoenaed materials on June 7, 1977 or else be held in contempt.

Szanto appeals from the order commanding him to produce the subpoenaed records or be held in contempt.

Szanto filed a notice of appeal from the order directing him to produce the subpoenaed records on June 7, 1978 or be held in contempt. He then moved for a stay of this order in the Appellate Division, Second Department. On June 6, 1977, a conference was held in the chambers of Justice SHAPIRO of the Appellate Division, during which he suggested to Assistant Attorney General Marine that he issue

a new subpoena rather than pursue a contempt proceeding with respect to the original subpoena. Mr. Marine agreed to this suggestion.

A second subpoena is issued.

On August 1, 1977, a second grand jury subpoena duces tecum was issued to Szanto, commanding him to appear before the grand jury with the subpoenaed materials on August 25, 1977. Mr. Szanto moved to quash this subpoena on the ground that Section 610.25 of the Criminal Procedure Law, which had been recently enacted, is unconstitutional. *Matter of Far Rockaway Nursing Home* v. *Hynes.* This motion was denied by Justice BALBACH of the Supreme Court of Queens County on December 16, 1977. He ordered that the subpoenaed records be produced before the court on January 6, 1978 at which time a hearing would be held "to determine the length of time said records may reasonably be held and the conditions under which said records may be maintained pursuant to the criteria set down in Criminal Procedure Law, Section 610.25(2).

Szanto fails to produce most of the subpoenaed records as ordered by the court, claiming that they had been stolen during the proceedings.

Szanto did produce some records at the court, as required by Justice BALBACH's decision. However, most of the records were not produced. As stated by the Court of Appeals in the decision being appealed from:

> Denying appellants' motion to quash, Supreme Court, Queens County, held the statute constitutional, and ordered that the subpoenaed documents be placed in the custody of the Supreme Court, Queens County. However, most of the documents have not been delivered to the court due to an *alleged* burglary at Far Rockaway Nursing Home which *allegedly* occurred on June 6, 1977 (emphasis added).

Matter of Far Rockaway et al. v. *Hynes,* 44 N.Y.2d at 390.

The Court of Appeals affirms the lower court decision.

Upon a direct appeal to the Court of Appeals, based solely upon the appellant's challenge to the constitutionality of Section 610.25 of the Criminal Procedure Law, the Court unanimously affirmed the lower court's decision. *Matter of Far Rockaway Nursing Home et al.* v. *Hynes,* 44 N.Y.2d 383 (1978).

Szanto commences a federal action to challenge the subpoena.

After the Court of Appeals' decision, Szanto filed a complaint in the United States District Court for the Eastern District of New York seeking injunctive and declaratory relief from having to comply with the subpoena. *Far Rockaway Nursing Home and Laszlo Szanto* v. *Hynes,* 78 Civ. 1179. Szanto's motion for a preliminary injunction was denied by Judge NICKERSON on June 8, 1978. In a decision dated June 15, 1978, Judge NICKERSON stated that he would dismiss this complaint based upon the abstention doctrine unless the plaintiffs showed cause why it should not be dismissed within twenty days. This was not done and the complaint was subsequently dismissed.

A hearing is held to determine the time, terms and conditions of the grand jury's right to possess the subpoenaed materials.

After Szanto had failed in his attempt to have the federal court enjoin enforcement of the subpoena, a hearing was held before Justice BALBACH of the Supreme Court, Queens County, pursuant to Section 610.25 of the Criminal Procedure Law, to determine the time, terms and conditions of the grand jury's right to possess the subpoenaed materials. A decision was rendered by Justice BALBACH on June 20, 1978. He ordered that certain records be reproduced and returned to the nursing home immediately after the grand jury obtained possession of them. He also ordered that the remaining records could only be retained by the grand jury until October 4, 1978, after which they would have to be returned.

Szanto appeals from the order establishing the time, terms and conditions of the grand jury's right to possess the subpoenaed material and seeks a stay pending that appeal.

Szanto filed a notice of appeal from the order of Justice BALBACH setting the time, terms and conditions regarding the grand jury's right to possess the subpoenaed materials. He also sought a stay from the Appellate Division, Second Department, pending resolution of that appeal. This application was denied on July 5, 1975.

Szanto complies with the subpoena.

Following the denial of a stay, the subpoenaed books and records were produced before the grand jury on July 5, 1975.

Statute Involved

Section 610.25 of the Criminal Procedure Law (McKinney's Consolidated Laws of New York, Book 11A), whose constitutionality is challenged by the appellant, provides:

> §610.25 Securing attendance of witness by subpoena; possession of physical evidence
>
> 1. Where a subpoena duces tecum is issued on reasonable notice to the person subpoenaed, the court or grand jury shall have the right to possession of the subpoenaed evidence. Such evidence may be retained by the court, grand jury or district attorney on behalf of the grand jury.
>
> 2. The possession shall be far a period of time, and on terms and conditions, as may reasonably be required for the action or proceeding. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (a) the good cause shown by the party issuing the subpoena or in whose behalf the subpoena is issued, (b) the rights and legitimate needs of the person subpoenaed and (c) the feasibility and appropriateness of making copies of the evidence. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.

POINT I

This appeal should be dismissed because it is moot.

Szanto has complied with the subpoena which he had sought to quash in the state court proceedings from which he seeks to appeal to this Court. Therefore, his appeal is moot and should be dismissed. *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974).

POINT II

The appellant's claims on appeal are frivolous. His appeal should be dismissed for want of a substantial federal question.

The appellant claims that the New York law permitting a grand jury to possess subpoenaed materials for a reasonable period of time for the purposes of its inquiry is unconstitutional absent a requirement that there be a showing of probable cause to believe that those materials contain evidence of a crime or are the fruits or instrumentalities of a crime. He claims that the Fourth Amendment is violated by such a law. This claim is without colorable merit.

This Court, as early as its decision in *Hale* v. *Henkel,* 201 U.S. 43 (1905), has recognized that a subpoena duces tecum authorizes the temporary dispossession of an owner's property for the uses of proof in a judicial proceeding and that probable cause, within the meaning of the Fourth Amendment, is not required. As stated by this Court:

> We think it quite clear that the search and seizure clause of the 4th Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum,* the production, upon a trial in court, of documentary evidence. As remarked in *Summers* v. *Moseley,* 2 Cromp. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ.

Id. at 73. Justice McKenna, in his dissenting opinion (based upon his disagreement with the majority that even a limited application of the "reasonableness" requirement of the Fourth Amendment to a subpoena was appropriate) also recognized that a subpoena subjects a person's property to the uses of proof:

> There can be, at most, but a temporary use of the books, and this can be accommodated to the convenience of the parties. *It is matter for the court, and we cannot assume that the court will fail of consideration for the interest of parties, or subject them to more inconvenience than the demands of justice may require* (emphasis added).

Id. at 80.

This Court has clearly and consistently followed its decision in *Hale* v. *Henkel, supra,* by stating that the Fourth Amendment, "if applicable" at all to a subpoena duces tecum, is satisfied if the subpoena is reasonable, without requiring a showing of probable cause. See *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 195, 208-09 (1946); *United States* v. *Dionisio,* 410 U.S. 1, 11-12 (1973); *United States* v. *Miller,* 425 U.S. 435, 445-46 (1976).

Ironically, the appellant argues that Section 610.25 of the Criminal Procedure Law is unconstitutional because

it specifically directs a court to consider three factors in determining the reasonableness of the time, terms and conditions of the grand jury's possession of subpoenaed materials. This is precisely what Justice McKenna stated that courts should do in *Hale* v. *Henkel, supra*: "It is matter for the court and we cannot assume that the court will fail of consideration for the interest of parties, or subject them to more inconvenience than the demands of justice may require." *Id.* at 80.

The appellant argues that he has standing to challenge the constitutionality of this statute on its face because it subjects him to the criminal sanction of contempt should he misunderstand its terms, which he characterizes as "vague." This statute is not addressed to the appellant's conduct. It does not proscribe any act or ommission or subject anyone to any penalty, civil or criminal, for failing to abide by its terms. It merely advises courts concerning the factors to be considered in exercising their discretion to set limits upon the time, terms or conditions of subpoenas duces tecum. The appellant would be subjected to a contempt citation only if he were to disobey a a court order directing him to comply with such a subpoena. Presumably, there would be nothing vague about such an order.

In any event, this entire argument is academic. Following the Court of Appeals' decision affirming the validity of the subpoena duces tecum in issue here, the lower court, acting pursuant to Section 610.25, set limits upon the time, terms and conditions under which the grand jury could possess the subpoenaed records. Szanto sought a stay so

that he could appeal from that decision. His stay application was denied. Thereafter Szanto complied with the subpoena. He can hardly claim now that he is subject to a criminal sanction should he not comply.

Conclusion

The appellant's appeal should be dismissed. In the alternative, the order of the Court of Appeals should be affirmed without argument.

Respectfully submitted,

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